Supreme Court, U.S.
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No. 91-1821

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ODD ANDERSEN,

Petitioner,

v.

GATES CONSTRUCTION CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT GATES CONSTRUCTION CORP. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review a jury's fact bound finding that a general release was valid and binding.

2. Whether the summary, unpublished judgment order of the United States Court of Appeals for the Second Circuit, created a conflict with other circuits that have considered this Court's decisions in Tipton v. Socony Mobil Oil Co., Inc., 375 U.S. 34 (1963) and Eichel v. The New York Central R.R. Co., 375 U.S. 253 (1963).

STATEMENT UNDER RULE 29.1

Respondent does not have a parent corporation or subsidiaries (except wholly owned subsidiaries).

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BRIEF IN OPPOSITION OF RESPONDENT, GATES CONSTRUCTION CORP.

OPINION BELOW

A summary unreported judgment order was issued by the Second Circuit Court of Appeals (PET Appendix A1-A4).

JURISDICTION

The summary order affirming the judgment of the district court dismissing the complaint was filed on January 13, 1992 and issued as a mandate on February 11, 1992. The petition for a writ of certiorari was docketed in this Court on April 13, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This case presents no questions of national importance requiring this Court's review. In its decision below, the Second Circuit Court of Appeals affirmed the finding of fact by a jury that Petitioner had entered into a valid and binding general release.

The Second Circuit's wholly fact bound decision has not created a conflict among the circuits. In addition, the Second Circuit's disposition of an appeal has no precedential value. Second Circuit Rule 0.23.

Absent any indication to the contrary it must by presumed that the Court followed circuit precedent and determined the issues based on precedent.

This Court should not waste its limited resources reviewing the petition. None of the requirements of Rule 10 of this Court have been met by the Petitioner.

COUNTER-STATEMENT OF THE CASE

Petitioner, Odd Andersen, a harbor worker whose particular trade was that of a dock builder filed this action to recover damages for personal injuries allegedly sustained on October 21, 1982. Petitioner belonged to the dock builders union and had been employed in this trade for over twenty-four (24) years and considered himself to be a dock builder not a seamen (330,339)[1].

In October of 1982, Petitioner was employed on a per diem or hourly basis by Respondent, Gates Construction Corp. Petitioner and a number of other dock builders had been hired to work at a construction site approximately 100 yards off Sandy Hook, New Jersey (331, 381-382).

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[1]Numbers in parentheses refer to the Appendix in the Court of Appeals.

Petitioner commuted to the off shore job site by car pool. He was then transported to and from the construction site at Sandy Hook by means of a launch. Petitioner was not required to operate the launch nor was he a member of her crew (335-336).

The off shore job site was a work platform or artificial island known as "Jack-Up Barge 113". The barge was equipped with legs or spuds which when fully extended was transformed from a floating barge into what the United States Coast Guard classifies as an "artificial island" (336-337 and 400-401). This artificial island provided a stable work platform which did not shift or move with the wind or currents (336).

In addition, to the Barge 113, there was a scow tied up along side the Barge 113. This scow was used to store wooden pilings

which were being utilized at the job site (334, 340, 345-347). The dock builders had no role in moving either the Barge 113 or the scow (370). Respondent had employed seamen who were responsible for moving the scow and the Barge 113. A tugboat was required to move the Barge 113 beyond the length of its anchor chains (370, 372-375).

Petitioner and other members of his crew were employed to drive the pilings, stored on the scow, into the seabed. Respondent was hired to create a mooring for vessels at the Sandy Hook location (331-332). On October 21, 1982, Petitioner was assigned the responsibility to trim the end of the wooden pilings. In order to do this a chainsaw was supplied. Petitioner claims that it was necessary to walk over "wet and muddy" pilings in order to cross from one end of the scow to the other (252). Respondent on

the other hand, introduced evidence that Petitioner had another alternative route available. The alternate route was that Petitioner could have walked along the perimeter of the scow. By using the perimeter, the Petitioner would have avoided walking on the pilings (370).

Petitioner testified at trial before a jury that he slipped and injured his back while carrying the chainsaw on the pilings on the scow (254). The accident occurred on Thursday, October 21, 1982, but Petitioner returned to work the following day. Petitioner worked for the Respondent for approximately one more week when the job was completed (254-257). No medical assistance was requested by the Petitioner at the time of the accident (257).

Petitioner took approximately one (1) week off between jobs and then started to work for a company he identified at trial as "Underpinning". While working in this position, Petitioner re-injured his back on or about December 15, 1982. A prior back injury had been sustained by the Petitioner in 1978 (257-259). The first time the Respondent was informed of the injury of October 21, 1982 was on December 15, 1982 when the Petitioner first requested medical assistance (259-260).

When the Respondent was notified of the accident, they notified their Underwriters. The Underwriters in turn assigned a claims adjuster by the name of Robert Harding to investigate and evaluate the incident (259-260). Mr. Harding subsequently contacted the Petitioner; conducted an investigation of the incident by interviewing the Petitioner

and his co-workers (895-896); arranged to have the Petitioner examined by a physician designated by him (911); arranged for the payment of Petitioner's medical bills; advised him of his rights to retain an attorney to file a claim against the Respondent (902); advised Petitioner of his rights under the maritime law and his rights to recover for pain and suffering (921). Mr. Harding obtained an advance for lost wages for the Petitioner (921).

Mr. Harding had spoken to Petitioner approximately ten (10) times (901). In Mr. Harding's opinion, Petitioner's claim was not a strong one from a liability standpoint (901).

Petitioner received medical treatment from Dr. Silverman a physician of his own choosing when he first received medical treatment (257-258, 807). Dr. Silverman

advised Mr. Harding and the Petitioner that he was free to return to work in April of 1983. Mr. Harding testified that he read to Petitioner the report prepared on behalf of the Respondent by Dr. Balensweig (881-882, 914, 927). Prior to the execution of the general release, Mr. Harding explained the legal ramifications which occur once the general release was executed by the Petitioner.

In response to a specific question concerning the legal effect of signing the general release, Mr. Harding informed the Petitioner and his wife that it would extinguish any further claims against the Respondent (925-926). The general release was signed by Petitioner and his wife on March 23, 1983 (259-261, 919-920).

At the time of the execution of the general release, a draft in the sum of $6,482.00 was given to the Petitioner. The amount of the draft was based upon the estimate of Petitioner's net loss earnings minus advances he had received during the period of disability (457, 904, 919). After the execution of the general release, Petitioner returned to work in April of 1983 (309-310).

The evidence at trial disclosed that the Petitioner re-injured his back in August of 1983 while on vacation (311). On November 16, 1983, Petitioner sustained a further injury to his back (312, 817). At the time the Petitioner re-injured his back in November of 1983 he was employed by Yonkers Construction Co., Inc. (309-310). Subsequent to the injury of November of 1983, Petitioner filled out a pension disability

form with his union. In the report, the Petitioner attributed his permanent disability to the accident of November 16, 1983 and not to the incident of October 21, 1982 while employed by Respondent. At trial, Petitioner claimed his permanency was the result of the accident while employed by Respondent (464 and 1064).

The jury after hearing all of the evidence concerning the Petitioner's prior and subsequent injuries to his back together with the evidence concerning the execution of the general release, found that the Respondent had sustained its burden of proof on this affirmative defense.

The jury was instructed by the district court that issues concerning Petitioner's status and whether Petitioner had established negligence under the Jones Act (46 U.S.C. 688) or unseaworthiness of the

scow need not be determined by them if the factual dispute regarding the general release was established by the preponderance of the evidence by the Respondent (1049).

REASONS FOR DENYING THE PETITION

I

THIS COURT SHOULD NOT WASTE ITS LIMITED RESOURCES REVIEWING A JURY'S FACT BOUND FINDING OF FACT THAT A GENERAL RELEASE IS VALID AND BINDING

Petitioner's argument to this Court is lifted almost verbatim from the brief filed with the circuit court. Petitioner does not address the central issue on the petition to this Court, namely, on what basis should the jury's finding of fact that the general release was valid be overruled or disturbed.

Petitioner argues that this Court's decision in Thompson v. Coastal Oil Co., 221 F.2d 559 (3rd Cir. 1955), rev'd 352 U.S. 862 (1956), mandates a reversal of the jury's findings. This Court in Thompson, supra, re-instated the judgment of the district court, in a non-jury personal injury claim by a

seamen held that a general release was invalid. The Court of Appeals for the Third Circuit had determined in its evaluation of the facts that the general release was valid.

In the present case, all of the relevant factors relating to the validity of the general release were presented to the jury for its consideration based on a proper charge by the district court. The jury was free to make its own determination on the conflicting evidence. A re-trial of the fact bound finding is not appropriate or proper for a petition for certiorari. S.Ct. Rule 10.

The central issue in the litigation in the district court was the validity of the general release. Both parties in their opening statements and summations focused on the issue of the general release (39-69 and

579-645). During trial, counsel for the Respondent had disputed the Petitioner's status as a seamen. In effect, counsel for the Respondent argued that the burden of proof of establishing that the general release was invalid was on the Petitioner. During the charging conference before the case was submitted to the jury, the district court ruled that Respondent had the burden of proof to establish the validity of the general release (670-671).

The leading case in this Court on the issue of a seamen's general release is Garrett v. Moore McCormack Co., 317 U.S. 239 (1942). Garrett holds in relevant part as follows:

> "We hold, therefore, that the burden is upon one who sets up a seamen's release to show that it was executed freely, without deception or coercion, and that it was made by the seamen with full understanding of his rights. The adequacy of the consideration and

> the nature of the medical and legal advice available to the seamen at the time of the signing the release are relevant to an appraisal of this understanding" 317 U.S. @ 248.

Respondent introduced evidence on each of the elements prescribed by this Court. At the outset it should be noted that Petitioner's native language was English, that he was a high school graduate and that he had an above average I.Q. (437). Petitioner likewise acknowledged that he understood the meaning of the word "general release" (438) and understood the effect of signing the document (451).

During trial, Petitioner seemed to imply that there may have been some deception in having him execute the general release when Petitioner testified that he thought the general release was a "receipt". Unfortunately for the Petitioner, this position or strategy did not occur to him

until after his pre-trial deposition taken during the discovery process. This is apparent because during the cross-examination of the Petitioner at trial, he conceded that he never used the word "receipt" when referring to the general release during the deposition (441-443). The Petitioner further conceded during the cross-examination at trial that he freely signed the general release in his wife's presence (443). Likewise, Petitioner's spouse testified at trial that she was not coerced into signing the document (112).

The evidence at trial demonstrated that the adjustor explained the legal effect of signing the general release while reading it with them prior to its execution (925-926).

Counsel for the Petitioner continues to maintain that the general release is invalid on its face because it was notarized prior to the Petitioner and his wife executing the document. During trial, counsel conceded that the prior notarization would have no effect on the validity of the general release as Petitioner admitted signing the document (644). Other suggestions have been made in Petitioner's brief concerning the adjustor's failure to advise the Petitioner of his rights under maritime law and the right to retain an attorney. These factual issues are set forth in the appendix (902-903, 921 and 925-926). The adjustor explained to the Petitioner his rights under the Jones Act and the doctrine of unseaworthiness under maritime law (932-933). Any conflict on the aforesaid issues were disputed by the testimony of

Petitioner's wife who acknowledged that the adjustor did mention the Jones Act during her presence (129).

Petitioner's brief at Pages 39 and 40 argues that the general release on its face is invalid because the adjustor did not totally explain to the Petitioner his medical condition prior to signing the general release to include, prognosis. This Court in Garrett stated that the nature of the medical advise available at the time of signing the general release is relevant to an individual's understanding of the effect of signing the document. The record below substantiates that Petitioner received medical treatment and advise from his own physician who determined that the Petitioner could return to work in April of 1983 (881-882). The Petitioner's physician did not diagnose a herniated disc until the accident

sustained by Petitioner while working for Yonkers Construction Co. in November of 1983 and diagnostic tests were conducted (826 and 852-859).

In the interim, the Petitioner sustained at least three (3) subsequent back injuries after October of 1982 (259, 311-312). Respondent's physician testified at trial that Petitioner does not have a herniated disc but rather has a degenerative disc condition which was not the result of trauma (413). Based on this conflicting testimony, the jury was free to decide whether at the time the general release was executed, the Petitioner had available medical advice in order to demonstrate that the general release was freely executed.

Another element raised concerns the availability of legal advice for the Petitioner. The evidence presented to the

jury confirmed that the Petitioner had previously been represented by counsel for various injuries (261-262 and 944-945). It can hardly be argued that competent legal advise was not available to the Petitioner based on his prior history of engaging counsel for prior injuries. Moreover, Petitioner was not a seamen in the traditional sense that he was unable to obtain counsel. Petitioner only worked per diem and returned home every night. The Petitioner was not isolated from obtaining legal advise because he was in fact part and parcel of the land based community.

The Court below readily recognized that questions of fact concerning the validity of the general release must be determined by the jury. This determination is consistent with the decision in this Court and the various circuit court's of appeals. Dice v.

Akron, Youngstown Railroad Co., 342 U.S. 359 (1952); Gifford v. Wichita Falls & S. Ry. Co., 211 F.2d 494 (5th Cir. 1954); German v. Carnegrie-Illinois Steel Corp., 169 F.2d 715 (3rd Cir. 1948); Blake v. W. R. Chamberlin, 176 F.2d 511 (9th Cir. 1949); Scola v. Boat Frances R. Inc., 546 F.2d 459 (1st Cir. 1976); Guerro v. American Hawaiian S.S. Co., 222 F.2d 238 (9th Cir. 1955); see, Annot., 43 A.L.R. 2d 786, 802 (1955).

The final issue raised by Petitioner on the question of the general release deals with the adequacy of the charge by the district court. The trial court quoted verbatim from the Garrett, supra, decision (670-671 and 719-722). The incorporation of Garrett, supra, in the charge by the district court satisfied the requirements of fair play and justice for all parties to the litigation and the jury was free to decide

the issues based on the credible evidence. This Court should deny the petition as there was no basis for granting, in effect, a re-hearing on its prior decision in Garrett, supra.

The Petitioner received a fair trial; district court correctly charged the law relating to seamen's general releases; and this Court is bound by the findings of the jury. Moreover, the judgment order of the circuit court has no binding effect or any precedential value.

II

THE JUDGMENT ORDER BY THE SECOND CIRCUIT DID NOT IN ANY WAY CHANGE THE PRINCIPLES SET FORTH IN TIPTON AND EICHEL

To begin with, the Petitioner's brief quotes out of context the trial testimony concerning the fact whether Respondent's counsel violated the in limine motion. Petitioner's motion was to prevent Respondent's counsel from using the fact that Petitioner was receiving compensation under the Longshoremens Harbor Workers' Compensation Act ("LHWCA") 38 U.S.C. 901 et seq., as evidence of Petitioner's status as a Jones Act seamen. Respondent's counsel consented to the motion only as it related to the status of the Petitioner.

Petitioner at trial argued that he sustained a herniated disc injury because of the accident of October of 1982. Respondent was free to rebut this argument by showing Petitioner's prior and subsequent injuries. This was the precise purpose of the inquiry by Respondent's counsel. The purpose of the inquiry was recognized and approved by the trial court (319-3210.

The only question asked was whether the Petitioner filed a claim with his subsequent employer. Counsel did not inquire as to the amount of compensation received nor that all of his medical bills had been paid (322). Interestingly, the same inquiry was made by Petitioner's counsel on direct examination concerning a prior injury (262).

The purpose of the holdings in Eichel v. New York Central R.R. Co., 375 U.S. 253 (1963) and Tipton v. Socony Mobil Oil Co.,

375 U.S. 34 (1963) was to prevent the admission of collateral source payments to mitigate the plaintiff's damages (Eichel) and to prevent the use of the fact that Petitioner received compensation under LHWCA as evidence of his status under the Jones Act (Tipton). In both Eichel, supra, and Tipton, supra, Petitioner's counsel was attempting to introduce the existence of a compensation claim for the same injury in order to either mitigate the damages or evidence of the Petitioner's status. In the instant case, Respondent's counsel was inquiring about a subsequent injury.

The judgment order of the Second Circuit did not confront the issues raised in the Tipton, supra, and Eichel, supra, cases. The inquiry, at best, was not prejudicial nor harmful to the Petitioner and did not violate any agreements by counsel. The sole

purpose of the inquiry was to advise the jury that the Petitioner sustained a subsequent injury (319-321).

CONCLUSION

FOR THE ABOVE STATED REASONS THE PETITION FOR CERTIORARI SHOULD BE DENIED WITH COSTS.

Dated: June 6, 1992

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